In The

Supreme Court of the United States

October Term, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK, THE GILLETTE COMPANY, DIGITAL EQUIPMENT CORPORATION, AND WYMAN-GORDON COMPANY,

Appellants,

vs.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, AND COALITION FOR TAX REFORM, INC., AND UNITED PEOPLES, INC.,

Appellees.

BRIEF OF THE STATE OF MONTANA, AMICUS CURIAE

MIKE GREELY
Attorney General
State Capitol
Helena, Montana 59601

JACK LOWE
Special Assistant Attorney General
Capitol Station
Helena, Montana 59601
(406) 449-2026

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

TABLE OF CONTENTS—Continued

TEXTS CITED

CONSTITUTION CITED

OTHER AUTHORITIES

In The

Supreme Court of the United States

October Term, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, NEW ENGLAND MERCHANTS NATIONAL BANK, THE GILLETTE COMPANY, DIGITAL EQUIPMENT CORPORATION, AND WYMAN-GORDON COMPANY,

Appellants,

vs.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL, AND COALITION FOR TAX REFORM, INC., AND UNITED PEOPLES, INC.,

Appellees.

BRIEF OF THE STATE OF MONTANA, AMICUS CURIAE

SUMMARY OF ARGUMENT

The issue as framed by Appellants is that corporations are entitled to complete freedom of speech under the First Amendment. But, is that really the question that should be addressed by the Court?

Appellants are business corporations who wished to use corporate funds, in violation of State law, for the purpose of defeating a ballot referendum proposing a State graduated income tax.

All activities of these business corporations are necessarily directed to advancing business interests. Therefore, to the extent that speech is involved at all here, it is not ordinary political speech, but rather a species of commercial speech. While this Court has recently recognized that commercial speech is entitled to some constitutional protection it has also recognized that this form of speech is not entitled to unrestricted constitutional guardianship. The rationale for the long history of State safeguards on the integrity of the election process, especially regarding corporate influence, more than justifies the restrictions upon commercial speech.

Amicus further contends that a corporation is an artificial entity, incapable of forming an opinion. If the Massachusetts statute does impose an infringement upon speech, it is a time, place and manner restriction upon the speech of management.

The problem of corporate spending in initiative and referendum campaigns is of keen interest to the State of Montana and its citizens. The issue was recently the subject of litigation in Montana.[1] An appeal is currently pending that will undoubtedly be influenced by the decision of this Court.

---

1 *C & C Plywood Corporation* v. *Hanson*, 420 F. Supp. 1254 (D. Mont. 1976).

ARGUMENT

I.

The Speech of the Profit Imperative

Appellants herein are business corporations. As such they are established for one reason, the acquisition of profit.

Profit orientation is not wrong; it is in fact basic to the system of economics in the United States. Corporations are required to pursue profit.[2] The old doctrines of waste and ultra vires are the direct result of the law's insistence upon a profit imperative. The corporation is in business to make money, as it should be. For this reason its speech, regardless of form, must be presumed to be commercial.

It may not be possible to construct a definition of commercial speech that encompasses all the facets of economic dialogue. Such a test cannot be narrowly construed. For instance, compare the two messages "I will sell you X cigarettes for fifty cents" and "Winston tastes good like a cigarette should." Certainly the second is no less commercial than the first. Thus a message cannot be classified as commercial only when it proposes a commercial transaction.

Nor can it be so classified simply on the basis of its content. To illustrate this fact, compare an identical

---

2 "It is undoubtedly the orthodox view that the function of the business corporation is profit and that it is therefore improper for it to spend money or engage in activities not entered into with a view toward profit." W. CARY, CASES AND MATERIALS ON CORPORATIONS (4th Ed. 1969), 60.

message spoken by two different speakers. If a druggist says "X drug is for sale at Y price," his message is obviously commercial. If the Virginia Citizens' Consumer Council says the same thing, it is not; it is a message of some interest to consumers, but grounded upon a more altruistic motive. Therefore, it is equally necessary to identify commercial speech by the motive or interest of the speaker.

The business corporation is the manifestation of the profit imperative. It must direct all endeavors toward its fundamental goal. When it follows this business motive corporate speech is commercial no matter what the superficial form of the message. Management is under a fiduciary obligation to use corporate capital to produce a return, and of necessity uses corporate speech strictly to that end. Thus plaintiffs in this case oppose the income tax referendum solely because of its effect on business, and that of course is precisely what they argue. This is commercial speech.

The distinction between commercial and individual speech is discussed by C. E. Baker, Commercial Speech: A problem in the Theory of Freedom, 62 Iowa L. R. 1, 3, 13 (1976):

> [T]he individual uses speech to order and create the world in a desired way and as a tool for understanding and communicating about that world in ways which he or she finds important. In fact, the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice. However, in our present historical setting, commercial speech is not a manifestation of individual freedom and choice; unlike the broad categories of protected speech, commercial

> speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes.
>
> [T]herefore, a profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the First Amendment.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council,* 425 U. S. 748 (1976), this Court for the first time, granted a degree of First Amendment protection to speech of a purely commercial nature. The Court did not hold, however, that all forms of commercial speech were beyond the parameters of state control.

To distinguish this case, it is important to realize the interest the Court sought to protect in *Virginia Board of Pharmacy* (supra), and most recently in *Bates v. Arizona Bar,* 45 U. S. L. W. 4895 (1977). The public interest may be served by commercial speech in some forms. Often it is of positive social benefit as the Court in the *Bates* opinion stated at 4899:

> The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of importance to significant issues of the day. See *Bigelow v. Virginia,* supra. And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system [cita-

> tions omitted]. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.

At the same time, the cases hold that commercial speech is of a different constitutional character than other varieties, and will admit of regulation that could never be applied to the arts, letters, political, religious or scientific debate, or to a newspaper. *Virginia Board, supra* at 771 held:

> 24. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between speech that does "no more than propose a commercial transaction" [citations omitted] and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and subject to complete suppression by the state, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of commercial information is unimpaired. . . . Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely. Attributes such as the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker . . . they may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints. . . . "

The rationale of *Virginia Board* and *Bates* seems to us significant. The societal interest served is the protection of consumers. The demonstrable economic benefits of the free flow of commercial information were more valuable

to society than whatever interest was promoted by the restriction. However, in the case at bar it is the restriction of commercial speech that serves the overriding interest of society.

II.

The State's Responsibility to Safeguard Elections is Sufficient Ground for Restricting Corporate Spending on Ballot Issues

If corporate spending on ballot issues is "speech," then it is commercial speech. The next question is whether States have constitutionally adequate justification for prohibiting this form of speech. The justification is rooted in the political relationship between corporations and the State. States have clothed corporations in such attributes as limited liability and perpetual life in order to increase the economic viability of corporations and so strengthen the economy generally. But the entity thus created and strengthened by the State has sometimes become so powerful that it has threatened the State itself. Vast economic power is readily translated into political power, and States have had to guard continually against excessive corporate influence in the political sphere. Speaking of this watchfulness on the part of States, Justice Brandeis called the corporation "an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State." *Louis K. Liggett Co. v. Lee,* 288 U. S. 517, 565 (1933) (Brandeis, J., dissenting). *Amicus* suggests that the State's necessary resistance to that domination provides adequate ground for prohibiting corporate spending on ballot issues.

Throughout this century, the State's fear of corporate domination has been reflected most clearly in election laws. Congress and many State legislatures passed laws prohibiting corporations from contributing to election campaigns.[3] The Supreme Court has recognized that the Federal prohibition was motivated primarily by "the necessity for destroying the influence over elections which corporations exercised through financial contribution." *United States v. Congress of Industrial Organizations*, 335 U. S. 106, 113 (1948). A later opinion recognizes that the States responded to the same motivation. Justice Frankfurter quoted approvingly from Elihu Root's 1894 speech in favor of a New York ban on corporate contributions:

> The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to those halls in order to vote for their protection and the advancement of their interests as against those of the public.

United States v. U.A.W.-C.I.O., 352 U. S. 567, 571 (1957).

Bans on corporate contributions in support of the election of candidates have been upheld. *Buckley v. Valeo*, 424 U. S. 1 (1976). If corporate speech (commercial speech) may be restrained to guard the electoral process when public officials are being elected, how can such restraint be unconstitutional when ballot issues are involved? The ultimate goal of the State in both cases is precisely the same: to guarantee that the economic power of corporations does not unduly influence the making of laws.

---

3 18 U. S. C. 610; Section 23-4744, Revised Codes of Montana, 1947.

It was precisely to counter this influence that State constitutional provisions for initiative and referendum were established.[4] They represent attempts by the citizenry to allow the passage of legislation free of the corruption of earlier times. But even where initiative and referendum are available, corporations can exert a degree of influence which States might well consider a threat to the integrity of the political process. In 1976, the California law limiting expenditures in ballot issue campaigns was invalidated on the strength of *Buckley*. *Citizens for Jobs & Energy v. Fair Political Practices Commission*, 16 Cal. 3d 671, 129 Cal. Rptr. 106 (1976). In the subsequent campaign against the passage of a referendum measure which would have required legislative approval of nuclear generating plant sites, a political committee known as "Citizens for Jobs and Energy" collected $2,630,104 of the total $2,771,804 collected by all opponents of the measure.[5] Two-hundred and three corporate contributors gave a total of $2,527,558, or 96% of all the money that CJ&E received. Supporters of the measure collected $1,903,425, or 68% of the total collected by the opponents. No corporations are listed among the contributors in support of the measure, which was defeated in the primary election.

---

4 The constitutions of 21 states provide for peoples initiative, and 38 plus Puerto Rico and the Virgin Islands have the referendum. Council of State Government, Book of the States, 48-50 (1974 ed.).

5 These and subsequent figures on the California campaign are from Campaign Contribution and Spending Report—June 8, 1976 Primary Election, published by the California Fair Political Practices Commission, October 29, 1976.

Later in the same year, a similar initiative measure was qualified for the general election ballot in Montana. Since Montana's statute prohibiting corporations from contributing to ballot measures had been declared unconstitutional,[6] corporations were allowed to spend money on the measure. The "Montanans Against '71' Committee-Citizens Opposed to the Nuclear Ban" collected $144,300 in contributions, of which $315 came from individuals, and the remaining 99.8% from business corporations.[7] Proponents of the measure collected and spent $451, all donated by individuals. The measure was defeated.

It may never be possible to prove that corporate contributions were decisive to the outcome of a particular ballot issue. Yet a State legislature, faced with figures like those just cited, would be well within the bounds of reason if it feared that corporate economic power was overwhelming rational citizen decision-making in the referendum or initiative process. The question, finally, is whether, to prevent that possibility, the State can prohibit one type of commercial speech: corporate contributions on ballot issues. The State interest involved is no less than the integrity of the political process.

Many State legislatures are constitutionally required to "insure the purity of elections and guard against abuses

---

6 *C & C Plywood Corporation v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976).

7 These and subsequent figures on the Montana campaign are from sworn statements of contributors and committees in the files of the Montana Commissioner of Campaign Finances and Practices.

of the electoral process."[8] Such a mandate is a key feature of a State constitution, since any abuse of the electoral process threatens self-government, and so threatens the constitution itself. If States may not regulate commercial speech in the name of this ultimate State interest, then it is difficult to imagine when commercial speech could be regulated at all. Yet the Supreme Court has said that commercial speech may be restrained for the purpose of precluding misleading statements about legal services. *Bates v. Arizona Bar, supra.* If that purpose is compared to the purpose of protecting the integrity of the political process, there can be no doubt about which is the more crucial State interest. The conclusion must be that States have constitutionally adequate justification for prohibiting corporate contributions on ballot issues.[9]

---

8 Montana Constitution, Article IV, § 4; Cf.: California Constitution, Article II, § 3.

9 *Buckley* found that the gift of money to another for political use was more "conduct" than "speech," and statutory limitations on it were upheld.

Montana's experience has been that corporate contributions to ballot campaigns are overwhelmingly of the indirect variety. Corporations wishing to influence ballot issues give their money to committees like the "Montanans Against '71' Committee—Citizens Opposed to the Nuclear Ban," rather than spending it in their own names. In California, 95% of the money contributed in opposition to the nuclear proposal was channeled through the committee called "Citizens for Jobs and Energy." Thus experience shows rather dramatically that corporate contributions to ballot campaigns is more legitimately covered by the "gift" portion of *Buckley* than by the "expenditure" portion, and therefore more appropriately called "conduct" rather than "speech."

(Continued on next page)

III.

A Corporation is Not An Individual

> "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen. . . . " Mr. Chief Justice Marshall In *Bank of the United States v. DeVeaux, et al.*, 2 U.S. (5 Cranch) 194, 196 (1809).

It is common for the law to single out a particular person or entity and prescribe special prohibitions or qualifications upon its speech. These are not true "content" restrictions, for anyone else other than the speaker is free to say the same thing. In certain situations the ful protection of the First Amendment does not apply to

---

(continued from previous page)

There is another aspect of this corporate spending through committees which is particularly relevant to ballot issues. Referendum and initiative are legislative processes performed directly by citizens as flesh-and-blood people. The Montana Constitution provides in Article V, § 1 that "The people reserve to themselves the powers of initiative and referendum." When corporations form political committees to support or oppose ballot issues, they almost invariably assume a name which makes them appear to be among the "citizens" or "people" to whom these processes are reserved. Newspaper readers and television viewers never know that 96% of the aid paid for by "Citizens for Jobs and Energy" was really bought by corporations who are not "citizens" at all, or that 99.8% of an ad in the name of "Montanans Against '71' Committee—Citizens Opposed to the Nuclear Ban" was bought by corporations who are not "citizens," or that 97% of the same ad was bought by out-of-state money. It is precisely such subterfuges that States seek to avoid by banning corporate contributions on ballot issues. The legislative intent is to fulfill the spirit of the constitutional provision reserving initiative and referendum to the people.

that speaker. Examples are the restraints placed upon the political activity and speech of civil services employees;[10] upon members of the military services;[11] upon the voting rights of felons;[12] and, prominently, the FCC's "Fairness doctrine" imposed upon broadcasters,[13] who, unlike the first National Bank, are actually in the First Amendment "business." The Massachusetts statutory scheme places such a speaker restriction on business corporations.

Corporations are treated singularly because the corporate form exists only in contemplation of law. It is an artificial entity, a fictitious "person." People create corporations because it is a convenient way of doing business and the State grants it its right to existence. Incorporation is a way of divorcing a business entity from its human ownership and management. In fact, the most important function of the corporation is to legally formalize this separation.

The focus of the Bill of Rights is upon the freedom and liberty of the individual. See: *Bell v. Maryland*, 378 U. S. 226 (1964). For the most part it guarantees freedoms which can only be exercised by natural human beings. As a legal fiction, a corporation enjoys its benefits only insofar as it needs or is capable of exercising them. The facts of this case establish no such need, and the

---

10 *Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548 (1967).

11 *Secretary of the Navy v. Avrech*, 418 U. S. 676 (1974).

12 *Richardson v. Ramirez*, 418 U. S. 24 (1974).

13 *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367 (1968).

corporation simply lacks the capability. The plain fact is that any opinion on the tax referendum must be traced to the desires and decisions of natural persons. Plaintiffs must therefore define whose speech the law has abridged. Either it restricts the speech of the stockholders or that of management.

The First National Bank is not the NAACP. The cases granting institutional First Amendment rights to such organizations have been careful to point out their cohesive quality and the presumptively common purpose of their memberships, e. g.,: *NAACP v. Button,* 371 U. S. 415, 443 (1961).

The Bank's stockholders, on the other hand, are "unidentified members of the public at large," and can scarcely be said to have bought their stock as an act of political symbolism. Nor can they realistically be expected to thing cohesively on political issues. The law, in fact, seems designed to protect that segment of ownership which might have no opinion or even disagree with management[14] when the corporation's funds are put to a political purpose. Moreover, the shareholders' speech can hardly be said to be abridged since they are free to use their personal funds to support or oppose any political issue.

---

14 Compare the Court's concerns for protection of minority membership expressed in *Abood v. Detroit Board of Education,* 97 S. Ct. 1982 (1977); *Brotherhood of Railway Clerks v. Allen,* 373 U. S. 113 (1963); *Association of Machinists v. Street,* 367 U. S. 740 (1961); and notably, *Pipefitters Local 562 v. United States,* 407 U. S. 385 (1972).

If there is "speech" involved here, it must be the speech of management. But corporate managers are free to speak as they wish, and to spend money to promote their beliefs and ideas. What they claim is that their speech is abridged by their inability to use their employer's treasury to promote political viewpoints.

It will inevitably be claimed by Plaintiffs that opposition to the Massachusetts tax referendum is in the best interest of their corporations, and a matter of sound business judgment. Perhaps so. But even within its proper business context, the speech of the commercial enterprise is subject to regulation in the public interest. The speech restrictions of the National Labor Relations Act,[15] the Securities Acts of 1933 and 1934,[16] and the Truth-in-Lending Act.[17] are prominent examples, and elections are another.[18]

Whose speech, then, is abridged by Mass. G. L. Ch. 55, § 8? It seems to us that rather than a content restriction on the speech of corporations, the statute is a time, place, and manner restriction upon management.

---

15 29 U. S. C. 141, 151, 158.

16 15 U. S. C. 77, 78.

17 15 U. S. C. 1601, et seq.

18 2 U. S. C. § 441(b).

CONCLUSION

The activities of business corporations are wholly submerged by the dictates of business interests. Any "speech" capabilities they have must therefore be commercial. While commercial speech enjoys some First Amendment privileges it must bow to State prohibitions promulgated to serve overriding societal interests, such as the integrity of the electoral process.

A corporation is not an individual. To say that it has an opinion is specious. It might as well claim freedom of religion. It seems to us the very paradigm of irony, that an Amendment enacted in the days of Reconstruction as a shield for the poor and defenseless, should now be used as a sword by the wealth and power demonstrated by the array of Plaintiffs in this cause.

Respectfully submitted,

MIKE GREELY
Attorney General

Capitol Building
Helena, Montana 59601

JACK LOWE
Special Assistant Attorney General

Capitol Building
Helena, Montana 59601